No. 14-1406

IN THE

Supreme Court of the United States

NEBRASKA ET AL., PETITIONERS

v.

MITCH PARKER, ET AL.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*

The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA). Both CERA and CERF are South Dakota non-profit corporations. CERA has both Indian and non-Indian members in 34 states. CERF was established to protect and support the constitutional rights of all people, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights of CERA members. CERA actually has two board members that live in Thurston County, Nebraska and are directly impacted by the decisions of the lower federal courts that the Village of Pender is again part of the Omaha Indian Reservation. Both board members and their families understand that if Pender is no longer under the primary jurisdiction of the State that they will lose the tax base that allows the village and county to provide the routine services and functions that have made Pender just another local town to shop in and go to for entertainment. In addition, like virtually all of CERA's members they understand what it means to be living in Indian country as defined in 18 U.S.C. § 1151 and do not want tribal jurisdiction to apply to Pender. This is not because they are worried about being governed by people who choose to be members of the tribes occupying the reservation. The problem is not with the people but with the fact that the tribal government is not limited by the application of the Constitution of the United States. Removing an area from state jurisdiction and restoring it to tribal jurisdiction removes all constitutional safeguards to equal protection and due process of law required under state and federal law.

CERF submits this *amicus curiae* brief to add the perspective of its members who have been adversely affected by federal Indian policy and want that policy to significantly change. CERF promotes the belief that the equal protection of the laws should apply to all persons in the United States and to all lands within the exterior boundaries of the United States. CERF firmly believes that the United States government should be promoting the interests of all of its citizens on an equal basis. Since July 8, 1970 when the Nixon Indian Policy was declared, the United States has aggressively promoted tribal sovereignty and deliberately attacked communities to reassert long dead tribal interests disrupting the justifiable expectations of all members of the community. CERF questions what the Nixon Indian policy was supposed to achieve because it has not improved the lives of the Native Americans actually residing on federal Indian reservations and has divided many communities all over our nation.

All of the parties have filed blanket consent letters to the filing of all *amicus curiae* briefs before this Court for this case.[1]

SUMMARY OF THE ARGUMENT

CERF will explain in this brief that the Act of August 7, 1882, 22 Stat. 341, was intended by Congress to diminish the Omaha Indian Reservation. This brief

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than *amicus curiae*, CERF, its members or its parent CERA's members, or its counsel have made any monetary contribution to the preparation or submission of this brief.

will explain the reasons why there is sufficient language in the legislative history attached to the Act of August 7, 1882 to find that the Omaha reservation on the west side of the railroad right of way was intended to be diminished by Congress. It will then discuss how Congress in the 1880's was trying not to apply the harsh laws of the Indian Policy of 1871 as codified in the Revised Statutes to peaceful and productive Indian tribes like the Omaha. It will then address what this Court's considerations should be regarding diminishment cases in general to try to level the playing field against the United States representing solely the tribal government against all other interests.

This Court needs to discourage the current practice of the United States to continue to disrupt settled communities by reasserting long extinct tribal claims.

ARGUMENT

This Court has acknowledged that restoring tribal interests in mostly non-Indian areas upsets the "justifiable expectations" of the property owners and citizens of that area. *See City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). Unfortunately, the *City of Sherrill* decision has not been applied to an actual diminishment case to update the factors required to prove that an area was intended to be diminished or disestablished by an act of Congress. Specifically, the case of *Solem v. Bartlett*, 465 U.S. 463 (1984) needs to be reexamined and updated to reflect the more recent decisions of this Court.

I. THE ACT OF AUGUST 7, 1882, 22 STAT. 341, WAS INTENDED BY CONGRESS TO DIMINISH THE OMAHA INDIAN RESERVATION

The District Court did not have all of the relevant legislative history or facts surrounding the substitution of S. 1255 in the 1st Session of the 47th Congress that became the Act of August 7, 1882, 22 Stat. 341.[2] A key piece of the legislative history was missing that clearly explains the intent of Congress to not only diminish the Omaha Indian reservation but to restore the lands west of the railroad right of way to the public domain to be sold to *bona fide* purchasers under the public land laws. When S. 1255 was substituted in the House of Representatives by a new bill prepared by Chairman Haskell of the Committee on Indian Affairs a Report to accompany bill S. 1255 was attached to the bill. House of Representatives Report No. 1530, 47th Congress, 1st Session.

House Report No. 1530 is available as part of the now digitized Congressional Record readily available to all federal officials. Cong. Rec. – July 1882: p # Proquest Congressional Publications, web. The digitized Congressional Records are not readily accessible by members of the public. A private company, ProQuest, has digitized the Congressional Record and offers subscription access rights to their database for a fee. The Library of Congress has only digitized about the last 10 years of the Congressional Record. The Library

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[2] *Amicus Curiae* CERF does not have access to the Joint Appendix filed by the parties. CERF is assuming that because the House Report No. 1530 was not an important part of the briefing in the lower courts that the parties were unaware of its existence.

of Congress has not made their digitized volumes word searchable as has been done by ProQuest.

The Congressional Record was never easy to use. Usually, a Congressional Report attached to a bill was noted in the margins of the Statutes at Large. From that notation in the Statutes at Large it was possible to find the Report in the Congressional Record. Without that notation it would be very difficult and time consuming to try to find any legislative history on a specific bill in the Congressional Record. The House Report No. 1530 is not noted in the margins of the Statutes at Large for S. 1255. *See* 22 Stat. 341-343. That fact would have made it almost impossible for anyone but federal employees with direct access to the searchable ProQuest database to find House Report No. 1530.

The legal consultant for CERF was told of this House Report attached to S. 1255 when she requested an archivist at the National Archives to help her research the legislative history of S.1255 before attempting to write the draft of this *amicus* brief. The archivist printed House Report No. 1530 from the ProQuest database for her. The first two pages of House Report No. 1530 are important part for this case. The remaining pages 3-12 are all personal descriptions by individual Indians that signed the Memorial at the bottom of page 2 "for a grant of land in severalty" explaining their personal reasons for wanting full ownership of the land.

The important part of locating House Report No. 1530 is what it says in the first paragraph was the intent of House Chairman Haskell in introducing the full bill substitute of S. 1255.

> "By the terms of this bill, which is offered as a substitute for Senate bill No. 1255, it is provided that, with the consent of the Omaha tribe of Indians, all that part of the Omaha Indian Reservation in the State of Nebraska, lying west of the line of the Sioux City and Nebraska Railway, may be surveyed, appraised, and sold to actual *bona fide* settlers, who may hereafter, under the provisions of this bill, settle upon said lands, the proceeds of such sale being for the use and benefit of said Omaha tribe of Indians, leaving for the use and occupancy of the Omaha Indians about 140,000 acres of land. There will be sold under the terms of this bill about 45,000 acres of land, to be appraised at not less than $2.50 per acre."

Appendix 1a (emphasis added).

The phrase "leaving for the use and occupancy of the Omaha Indians about 140,000 acres of land" is direct proof that Congress intended in the bill S. 1255 that became the law of August 7, 1882 to diminish the Omaha Indian reservation. If there is still any question as to the Congressional intent for diminishment the next sentence that "There will be sold under the terms of this bill about 45,000 acres of land, to be appraised at not less than $2.50 per acre." resolves any doubt. This second sentence sets a sum certain for the value of the lands to be sold on the western side of the railway. As

the *Solem* Court said when Congressional language of intent to diminish is coupled with a sum certain payment it creates an almost insurmountable presumption that the intent of Congress was to diminish the reservation. *Solem v. Bartlett*, 465 U.S. 463, 471-2 (1984). As the Nebraska parties have stated in their opening brief, the Indian agent reported the consent of the Omaha tribe to the sale of the lands on May 5, 1883. *See* Nebraska Opening Brief at 7, citing J.A. 35.

Why this express language of the intent to diminish the Omaha Indian Reservation is in the House Report attached to S. 1255 and not in the language of the bill is a question that will never be answered. House Report No. 1530 was written to accompany bill S. 1255 as stated on its face. House Report No. 1530 as a matter of statutory construction is the contemporaneous and intended interpretation of Congress of bill S. 1255. As a matter of law, it is a part of the Act of August 7, 1882, 22 Stat. 341. *Solem* at 471. With the inclusion of House Report No. 1530 as part of the legislative history of the Act of August 7, 1882, 22 Stat. 341, the requirements for *de jure* diminishment as described in *Solem v. Bartlett* are met. *Id.* at 471-2.

The Nebraska parties argue how the three requirements set in *Solem v. Bartlett* should have been interpreted by the lower courts to conclude that the Congressional intent of S. 1255 was to diminish the Omaha Indian reservation. "The district court held that ambiguous evidence regarding the first two *Solem* factors-statutory language and legislative history-necessarily foreclosed any possibility that diminishment would be found on a *de facto* basis. Pet. App. 68."

Nebraska Opening Brief at 19. The district court decision was clearly incorrect when the language of House Report No. 1530 is included in the legislative history of the Act of August 7, 1882. But if the district court had followed the instruction of *Solem v. Bartlett* it would have found that the area around Pender had been *de facto* diminished. As the Nebraska parties argue ably in their opening brief there was no question that from 1883 forward the area on the western side of the railway line around Pender was predominantly non-Indian in character and should have been found by the lower courts to have been *de facto* diminished under the rationale in *Solem*. *Id.* at 471-472.

II. THE PURPOSE OF THE DAWES GENERAL ALLOTMENT ACT AND OTHER SURPLUS LAND ACTS BY CONGRESS IN THE 1880'S AND BEYOND WAS NOT FOR THE REASONS DESCRIBED IN *SOLEM V. BARTLETT*

The description in *Solem* of the federal Indian policy surrounding the passage of the Dawes or General Allotment Act of Feb. 8, 1887, 24 Stat. 388, is not what the records of the Congress in the 1880's indicate. What the records of Congress indicate is that the Congress and the federal agencies considered that the changes made to stop making treaties with the Indian tribes and to transfer the primary responsibility over the Indian tribes from the Department of State to the Department of the Interior in 1871 ended the assimilation policy and began a much harsher war power policy toward the Indians. See 25 U.S.C. § 71, 1 Rev. Stat. § 441 and § 442. *See also U.S. v. Lara*, 541 U.S. 193, 201 (2004).

A. The Indian Policy of 1871 rejected and deliberately contradicted the previous Assimilation Indian policy of the early United States

The main policy and purpose of the nascent United States toward Native Americans was the acquisition and domestication of territorial land. The Indian Commerce Clause, Art. I, Sec. 8, Cl. 3, was developed to avoid military conflict in the territorial lands allowing continued settlement and expansion of civilization. Only lands ceded by States outside of their boundaries were deemed "federal territory" under the Property Clause, Art. IV, Sec. 3, Cl. 2. These federal territorial lands were subject to the Northwest Ordinance of 1787 originally under the Articles of Confederation, and then adopted as the first law passed under the new Constitution. The Northwest Ordinance in Article 3 contained a written federal Indian policy designed to protect and assimilate the Native Americans. It also contained a specific provision prohibiting slavery in Article 6. The Northwest Ordinance contained the basic Indian policy but few details of how to legally acquire land from Native Americans and tribes. The development of federal territorial law required decisions on how to legally acquire lands from Indian tribes to allow those lands to become part of the public domain subject to disposal under the Homestead Acts and other federal cession laws as required by the Property Clause.

The "Indian title" case of *Johnson v. McIntosh*, 21 U.S. 543 (1823) presented the problem of whether the United States was the successor to the sovereignty established by England over the Northwest Territory

and former colonies. This was not a federalism question because the United States Congress as part of the compromise to enable the Louisiana Purchase had passed a statute authorizing the President to negotiate the removal of any Indian tribe East of the Mississippi to the Western territories. The same statute conceded that those Indians and Indian Tribes that remained in the Eastern States were under state jurisdiction. *See* Act of March 26, 1804, § 15, 2 Stat. 289. This act has never been repealed. In a clever application of constitutional law, Chief Justice Marshall preserved the concept of "Indian title" but divested it from its origins in Europe by ruling that only the United States as the winner of the Revolutionary War had the authority to accept the Indian land cessions by treaty. Because the United States had already conceded that it did not control Indian land in the Eastern States in 1804, the resolution of the Indian title question that removed the British cloud of title to millions of acres of Western lands only invigorated the outcry for the removal and actual cession of the Indian title in the original States.

In the 1820's the President began to vigorously pursue a removal policy of all Indians east of the Mississippi River. Congress passed the federal Removal Act of 1830, 4 Stat. 411, to define and enforce the removal policy agreed to in 1804. The Removal Act was specifically drafted to meet the obligations of the federal government to the States to remove the Indians, dispose of the "Indian title" to the lands they occupied and fulfill their federal treaty interests on actual federal territory West of the Mississippi as required by the 1804 Louisiana Purchase statute so that state jurisdiction would no longer be impaired in the Eastern states.

Chief Justice Marshall disagreed with the Removal Act policy defined by Congress and tried to interfere with it by his rulings in *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1 (1831) and *Worcester v. Georgia*, 31 U.S. 515 (1832). Congress responded by passing the 1834 Indian Trade and Intercourse Act, 4 Stat. 729, deliberately ceding that all Indian tribes and Indian land East of the Mississippi River would no longer be under federal protection once their lands were exchanged pursuant to the Removal Act, overruling *Worcester* by statute. The removal policy deliberately displaced the remaining Eastern Indians from their ancestral lands to make way for European settlement. Nowhere was this more obvious than the infamous "Trail of Tears." The young nation to progress had to displace the old and complacent sentimental views of Native Americans to their vast areas of land that to European eyes were wild and needed to be put into production. Admittedly, some of these removals were little more than deliberate stealing of the valuable Indian lands for exchanges for undeveloped lands in the Territory of Oklahoma.

This early United States Indian policy was not genocide. This assimilation Indian policy encouraged Indians to be domesticated to the European ways just as immigrants from all countries were being included within the "melting pot" of all people making up the new United States. This Assimilation Indian policy was far from perfect or ideal. Those Indians who wished to retain their tribal customs and ways were removed to federal territories not yet admitted as states. This gave these removed Indians more time and another chance to domesticate themselves to become citizens of what would be new states. This Indian policy lasted into the

1850's when the issues of slavery began to dominate all issues regarding acquisition of additional federal territorial land and the admittance of new states.

Territorial land law by English definition encompassed the war powers necessary to civilize and domesticate the new land. Congress has plenary territorial war power authority to determine the processes and rights of persons in the territories until those territories become States. *See American Insurance Co. v. Canter*, 26 U.S. 511 (1828). Importantly, the distinction made by the English as to domestic versus territorial law had been a major cause of the Revolutionary War itself by denying to the colonists the constitutional rights of Englishmen. The Framers of our Constitution because of this distinction in fundamental rights between the application of domestic and territorial law specifically required that Congress "dispose of the territories." Property Clause, Art. IV, Sec. 3, Cl. 2. This requirement to dispose of the territory and create new States was defined by this Court as allowing the United States to retain territorial land only on a temporary basis. *See Pollard's Lessee v. Hagan*, 44 U.S. 212, 221 (1845). This specific requirement was meant to prevent the United States from being able to use the territorial war powers as domestic law against the States and individuals. It is one of the most fundamental pieces of the structure of our Constitution.

From the beginning there were skirmishes with the Indian tribes. Under the Assimilation policy of the early days of the nascent United States these skirmishes were viewed as temporary uprisings. The Seneca uprising in New York in 1779 required the

federal courts to create a temporary federal common law designation to deal with New York's temporary loss of jurisdiction assumed by the United States Army. As a matter of federal Indian common law, the federal courts interpreted these conflict zones as "Indian country." *See generally United States v. Donnelly*, 228 U.S. 243 (1913). Acknowledging a temporary status of "Indian country" because of an Indian uprising did not change the underlying ownership or jurisdiction of the land. *See Fletcher v. Peck*, 10 U.S. 87 (1810). As a matter of federal law, the Seneca lands in the State of New York never left state jurisdiction. *See United States ex rel Kennedy v. Tyler*, 269 U.S. 13 (1925).

Starting with the majority decision in *Dred Scott v. Sandford*, 60 U.S. 393 (1857) that used the Indians to compare and contrast the status of Negroes to justify how they could never become citizens, federal Indian policy began a major shift. *Id.* at 404, 420. The Indian policy of 1871 is a war power policy. *Lara* at 201. The separate racial classification of "Indian" from *Dred Scott* was deliberately preserved in the Indian Policy of 1871 as codified in the Revised Statutes of the Reconstruction era. The Indian policy of 1871 was based on all Indians and Indian tribes as a race being potential belligerents against the authority of the United States. This change happened because so many Indian tribes raised hostilities during the Civil War. Many Indian tribes formed alliances with the Confederate States. *See Holden v. Joy*, 112 U.S. 94 (1872). This codification of the Reconstruction power over Indians preserved the territorial war powers used to fight the Civil War and to Reconstruct the Southern states following the war. *See* War Powers by William Whiting (43rd edition) p. 470-8. Under the 1871 policy

the only good Indian was a dead Indian. Even if an Indian left the reservation of territorial land made for his tribe and resided in town as a member of American society, he was deemed to be under the complete authority of Congress as an undomesticated person not capable of exercising the responsibilities of a citizen. Only Congress could change his status and grant citizenship *See Elk v. Wilkins*, 112 U.S. 94 (1884).

The Indian policy of 1871 rejects the idea that Indians can ever become productive citizens of the United States in complete opposition to the earlier assimilation policy. In the Revised Statutes setting the Indian Policy of 1871 are numerous statutes defining different types of Indian country. These definitions were not designed to protect the Indians from non-Indians trespassing or encroaching on lands reserved to them as the Indian country statute of June 30, 1834 was drafted. 4 Stat. 729, *See also Bates v. Clark*, 95 U.S. 204 (1877). The Indian country sections in the Revised Statutes were done to allow the Indians and Indian tribes to be suppressed by military action on the reservation or if they left the reservations. *See generally Dick v. U.S.*, 208 U.S. 340, 352 (1908).

The point *amicus* is trying to make is that the assimilation policy and the Indian policy of 1871 are two completely separate and contradictory policies. They are not compatible in any conceivable way. Justice Thomas in his concurring opinion in *Lara* called federal Indian policy schizophrenic because the original assimilation policy and the Indian war policy of 1871 are contradictory. *Id.* at 219. Justice Thomas could not have been more right.

B. There is a fundamental misinterpretation of the intent of Congress in adopting the Surplus Land Acts in *Solem v. Bartlett* that seriously misconstrues the intent of Congress in passing the Act of August 7, 1882 for the Omaha Indian tribe

The dockets of the Senate and House Committees on Indian Affairs clearly show the vigorous enforcement of the revised statute laws against the Indian tribes from the end of the Civil War until the early 1880's. By the early 1880's the ardor over the Civil War was finally beginning to subside. Members of Congress were realizing that many Indian tribes had never been hostile to the United States and were being denied the citizenship and land ownership they were promised in the old treaties. No Indian tribe had been considered more cooperative and able to become productive citizens than the Omaha. In fact the Treaty with the Omaha Indian tribe of March 16, 1854, 10 Stat. 1043, was considered the model for many other treaties with cooperative Indian tribes. *See U.S. v. Celestine*, 215 U.S. 278, 286 (1909).

The surplus land act that is at issue in this case was one of the first attempts by Congress to fulfill the old treaty obligations after federal Indian policy shifted to the 1871 policy. Senator Dawes of Massachusetts and Congressman Haskell were the leaders in trying to again assist the non-hostile tribes to make the transition to becoming citizens and true landowners. Congressman Haskell refused to force the Omaha to sell their land as he makes clear in House Report No. 1530 that was attached to S. 1255. His bill substitute

was done in full communication with the Omaha tribe. The majority of Congress was still convinced that the 1871 Indian policy was the right policy for the majority of the Indian tribes. This forced Chairman Haskell to do something that has not been acknowledged in the diminishment or disestablishment case law. This bill, S. 1255, was drafted to be executed under the public land laws and not under the federal Indian law of the 1871 policy.

Chairman Haskell drafted a bill that treated the Omaha tribe more like a business entity than an Indian tribe. Their contractual rights and the obligations of the United States were based on the Treaty of 1854. The Omaha Indians wanted their lands to be divided in severalty so that a subsequent Congress or a corrupt official with the Bureau of Indian Affairs could not remove them from the lands they had broken and were making profitable as had just happened to the Ponca tribe. See House Report at 1a-2a. This bill was designed to pay for the completion of the federal project of dividing their lands into severalty with the sale of the public lands on the western side of the railway line. *See generally U.S. v. California and Oregon Land Co.*, 148 U.S. 31 (1892). This is why the land on the western side of the railway was to be sold to *bona fide* settlers, this provision was supposed to activate the equity jurisprudence of the federal court to consider and balance all of the factors to execute the law as intended by Congress if litigation arose. *Id.* at 38-41.

There are several other provisions in this bill that make it clear it was not to be executed under the 1871 Indian policy. Section 2 of the act authorizes the Secretary of the Interior to issue a proclamation to

open the lands on the western side and set such rules and regulations for their sale as he deems necessary. This proclamation to open the lands had to do two things. First, to execute the law as written by Congress it had to proclaim that the reservation lands on the western side of the railway line were restored to the public domain. Then in the same proclamation the lands could be opened for settlement. This was the only way the sale and authority for the recording of all of these transactions for purchase by *bona fide* settlers could be handled under the General Land Office in Neligh, Nebraska as required by sections 2 and 4 of the Act of August 7, 1882. Section 4 goes on to say that the land patents for these lands shall issue under the homestead and preemption acts. The homestead and preemption acts were the main parts of public land law not Indian law.

Section 5 of the Act then clearly indicates that the division of lands into severalty on the eastern section of the reservation by the Secretary of the Interior will be issued by the Commissioner of Indian Affairs. These lands were clearly intended by Congress to remain part of the Omaha Indian reservation. Sections 6 and 7 attempt to limit the application of the 1871 Indian policy to these lands and people by carving out express rights during the 25 year trust and then stating the express rights the individual Indians will gain after the 25 year trust period expires. Section 7 says "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of said tribe of Indians shall have the benefit of and be subject to the laws, both civil and criminal, of the State of Nebraska; and said State shall not pass or enforce any law denying any Indian of said

tribe the equal protection of the law." Chairman Haskell was clearly trying to reach back to an assimilation position and give the Omaha tribe what they had been promised under the Treaty of 1854 and to treat these Indians as being fully capable of becoming capable and productive citizens of Nebraska.

The Act of August 7, 1882 was written to stop applying the very harsh Indian policy of 1871 to the Omaha tribe. The same Congressional intent was true five years later for the Dawes General Allotment Act of 1887. In the Congressional Indian Affairs Committee records are notes of hundreds of letters and memorials from churches and organizations all over the country urging the passage of the Dawes Act for non-hostile Indians. These acts of Congress were not intended to destroy Indian tribes but to empower individual Indians. This is also why Congress selected the tribes eligible for general allotment. Indian tribes that were still considered hostile were still under the primary authority of the military as the Indian Policy of 1871 required.

The diminishment and disestablishment cases of this Court all treat the Indian allotments as if they were intended to punish Indian tribes when exactly the opposite is true as to the intent of Congress in passing the acts. This one case cannot confront all of the vilification of the Dawes Act done by the promoters of the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, 25 U.S.C. § 461 et seq., and its deliberate language to stop the Indian allotment process. Nor can it sort out how any good law can become a bad law if it is abused or is corrupted by the federal officials charged with applying it. This Court in this case can address some of

the misassumptions in *Solem v. Bartlett* and correct the application of its principles to the facts and circumstances of the Act of August 7, 1882.

The *Solem* Court cites the Federal Handbook of Indian Law as the source of its understanding of the Surplus Land acts. *Solem* at 466-7, footnote 6. The Cohen Handbook just like the War Powers book of William Whiting were government publications specifically written to convince the Congress, the Courts and the public to agree and follow the new political policy position of the Executive branch for which they were written. The Federal Handbook on Indian Law was begun as the Indian Reorganization Act (IRA) was introduced as a bill in Congress to justify and promote the very extreme recommendations originally proposed by John Collier. As CERF explained in its *amicus curiae* brief for *Carcieri v. Salazar*, the original IRA bill introduced by John Collier used the Indian Policy of 1871 with its definitions of federal power over Indians from *Dred Scott v. Sandford* to find the necessary federal authority for many of its more extreme provisions.

As this Court well knows, when it interpreted 25 U.S.C. § 479 of the IRA as intended by Congress and not as interpreted by the Executive departments it created a major controversy that still has not quieted down. Even the restrained IRA that was eventually passed by the Congress in June of 1934, 25 U.S.C. § 451 et seq., relies on the 1871 Indian policy to permanently stop the allotments and to preserve the territorial status of the reservations indefinitely. As much as the IRA was touted as the New Deal for Indians, it has always had a very dark side because of the real basis of

its constitutional authority.[3] Enforcement of the Surplus Land acts that were written to deliberately avoid the 1871 Indian policy undermine the legal basis and justification of the IRA.

The Act of August 7, 1882 as explained above avoided the race based Indian policy of 1871 by applying the public land law to create the real property ownership rights in the members of the Omaha tribe. No Indians were forced by this Act to do anything. In fact, as House Report No. 1530 proves, the Omaha Indians specifically requested Congress to enact this legislation and gave it their full consent before it was applied to diminish the portion of the reservation west of the railroad right of way.

The three factors of *Solem* should be applied anew to these corrected facts. Congress directly legislated to diminish the Omaha reservation. The language of diminishment in the act itself is somewhat ambiguous but is not ambiguous when the language of the House Report attached to S. 1255 is included. With the House Report the diminishment language is sufficient to support *de jure* diminishment but clearly indicates that *de facto* diminishment occurred. Clarifying that an Indian reservation area that was

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[3] In fact, CERF has recently confirmed how Richard Nixon took advantage of the IRA and its reliance on the 1871 Indian policy. Nixon and his advisors in 1966 came up with the statute that allows the enforcement of Medicaid against the States. This was adopted under the deal struck between Nixon, Senator Robert Kennedy and President Johnson that ensured the passage of the Medicaid provisions. The statute designed by Nixon, 43 U.S.C. § 1457, is based on 1 Rev. Stat. § 441, the first provision of the codified Indian policy of 1871.

opened by Congress and became almost exclusively non-Indian should have been sufficient for the lower courts to have found *de facto* diminishment would complete an updating of *Solem v. Bartlett*.

III. THIS COURT SHOULD USE THIS CASE TO MAKE ITS OWN FEDERAL INDIAN COMMON LAW POLICY

This Court can either attempt to sort out the contradictory federal Indian policies that Congress has made or it can start making its own common law position that it can use to decide this case and subsequent cases. Continuing to defer to the elected branches to determine federal Indian policy just continues the morass of contradictory federal laws without resolution. This Court needs to admit that Congress is incapable and unwilling to make significant changes that confront the contradictions in the policies and law. This Court also needs to admit that the Executive administration is taking great advantage of the legal morass surrounding federal Indian policy as in this case and has gone overboard in promoting tribal sovereignty to the point of tearing down the very principles this nation was founded upon.

What CERF is proposing is that this Court declare common law principles that it will use to decide Indian law cases from this point forward. For example, this Court can decide from this case that the Omaha Indians were people entitled to become citizens capable of rationally and ably handling their own affairs in 1882. Such a finding by this Court would begin to restore the rights of the Indian people to bring them constitutional protections that they have been denied for far too long.

It would allow this Court to incrementally increase the fundamental constitutional principles that apply to the Indian people.

This is the second time CERF has found legislative history not previously disclosed to the lower courts. This time it is a major omission of a congressional record that would have ended this suit in the federal district court. Admittedly, this is not as bad as the giving of a false legislative history and denying the existence of the lists of tribes eligible for the Indian Reorganization Act that happened in the case of *Carcieri v. Salazar*, 555 U.S. 379 (2009). As long as the federal Department of Justice continues to promote tribal sovereignty against the interests of everyone else these situations will continue. The Department of Justice brings all its substantial resources and expertise against local attorneys who are able lawyers and do their best but do not have equal resources or access to the underlying documents and records to level the playing field.

CERF applauds the rule changes made by this Court to its own rules to prevent misinformation being used in a case again as happened in *Carcieri*. CERF wonders if adding a disclosure rule to the federal rules of civil procedure specifically that a United States agency sued under the Administrative Procedures Act is required to make a full disclosure of all the documents that could have been included in the administrative record would not assist in leveling the playing field and prevent the waste of judicial resources. CERF believes that the digitization of the Congressional Record is generally a major improvement. But that change has created a temporary

problem for accessing these very important records. As more records collections are digitized like those held in the Department of Interior Library, federal access is increased while public access so far has been greatly decreased.

CONCLUSION

This Court should reverse the decisions of the Eighth Circuit Court of Appeals and the federal district court and hold that the Act of August 7, 1882 diminished the Omaha Indian reservation on the western side of the railway line.

Respectfully submitted,
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